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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 856

CARL A. VERGARI, District Attorney of Westchester County, New York,

Petitioner,

against

208 CINEMA, INC. and PHILIP STEINBERG,

Respondents,

and

ERIC GELDART, Police Chief of the Village of Port Chester, New York,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI

CARL A. VERGARI,
District Attorney of Westchester County,
Petitioner.

B. ANTHONY MOROSCO,
Senior Assistant District Attorney,
Of Counsel.

249 Press of Fremont Payne, Inc., 80 Washington St., N. Y.—BOwling Green 9-8153

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PETITION FOR CERTIORARI

Opinions Below

The opinion of the United States District Court for the Southern District of New York on the instant motion is

unreported and is contained in the record as item 19 of the Record on Appeal in the Court of Appeals. It is set forth in the appendix, *infra*, at pages 16-23. There is no written opinion in the United States Court of Appeals for the Second Circuit but the Decree is contained in the Record and set forth in the appendix, *infra*, at pages 24-25. In its unrecorded oral decision from the bench the Court of Appeals relied upon its decision in *Bethview Amusement Corp.* v. *Cahn* (October 6, 1969), which is set forth in the appendix, *infra*, at pages 26-29. The opinion of Judge Pollack in the District Court, upon a previous motion in the instant case, referred to by Judge McLean in his opinion in the District Court on the instant motion, is unreported and is contained in the Record as item 9 of the Record on Appeal in the Court of Appeals. It is set forth in the appendix, *infra*, at pages 30-41.

Jurisdiction

The decree of the United States Court of Appeals for the Second Circuit was dated and entered on October 9, 1969.

An order of the United States Court of Appeals for the Second Circuit granting a motion by the petitioner for a stay of the mandate of that Court pending application for Certiorari was dated and enterd on October 17, 1969.

The Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Question Presented

Whether the rule requiring an adversarial hearing prior to a massive civil seizure of obscene material for the purpose of its suppression and destruction is also applicable to the seizure of a single print of an obscene motion pic-

re film for the good faith purpose of using it as evidence a valid criminal prosecution, where the seizure is had ursuant to an otherwise valid *ex parte* search warrant.

Constitutional and Statutory Provisions

The applicable Constitutional and Statutory Provisions e set forth in the appendix, *infra,* at pages 54-60 and are:

United States Constitution, First and Fourth Amendments and Fourteenth Amendment, Section One;

New York Penal Law, Sections 235.00, 235.05, 235.10, and 235.15;

New York Code of Criminal Procedure, Sections 791, 792, 793, 794, 795, 796, 807, 808, 809, 811, 812, and 813c.

Statement of the Case

Philip Steinberg, and his corporate entity, 208 Cinema, c. operate the Capital Theater in Port Chester, New ork. On April 18, 1969, and April 21, 1969, William H. cKenna, a Senior Assistant District Attorney of Westester County attended the theater and viewed the showg of that week's bill consisting of two full length obscene ns, "The Girl From Pussy Cat" and "Professor Lust" d approximately twenty minutes of obscene coming atctions. On April 22, 1969, Mr. McKenna made applican to Hon. George D. Burchell, County Judge of Westester County for a search warrant for the two films and ning attractions, supporting his application by a lengthy d detailed affidavit. The affidavit is contained in the cord as part of item 14 of the Record on Appeal and is forth in the appendix, *infra,* at pages 42-46. Before uing any warrant the County Judge, together with the

petitioner-District Attorney, attended the showing of the same films at the theater on the evening of April 22, 1969. The County Judge thereafter, having found the films obscene, issued the warrant. The warrant was thereupon executed as it was the last night that the films were scheduled to be shown.[1]

Steinberg was arrested and charged with offenses in violation of § 235.05, New York Penal Law.

On May 10, 1969, a second seizure and arrest occurred. The search warrant was obtained in the same manner as on the prior occasion except that it was a Village Justice who viewed the films and issued the warrant. Seized pursuant to that warrant were two additional obscene films, "A Thousand Pleasures" and "Love Is Where It's At," and additional obscene coming attractions. An unconformed copy of Mr. McKenna's affidavit in support of that warrant is contained in the Record as part of item 14 of the Record on Appeal and is set forth in the appendix, *infra,* at pages 47-63.

Steinberg, 208 Cinema Inc., and the corporate distributor of the films (who is not a party to the Federal action) were indicted and charged with violations of § 235.05, New York Penal Law.

Prior to the second arrest and seizure, Steinberg and 208 Cinema, Inc. commenced an action in the United States District Court, Southern District of New York for an injunction against present and future prosecutions naming as defendants the District Attorney and the Port Chester

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[1] The coming attractions could not be found and were seized later, pursuant to a supplementary search warrant. Two full length films not named in the warrant but which were advertised in the coming attractions were also seized but are being returned to the respondent Steinberg, and are not encompassed within this petition. In like manner, certain lenses seized pursuant to statute have already been returned.

Police Chief.[2] A motion for a preliminary injunction was denied (see appendix, *infra,* at pp. 30-41). Thereafter the instant motion for interlocutory relief in the form of a return of the seized material was denied in pertinent part (see appendix, *infra,* at pp. 16-23). Steinberg and 208 Cinema thereupon appealed to the Court of Appeals, which reversed the District Court, and held that a prior adversarial hearing was necessary on the facts of this case.[3]

The indictment is presently awaiting trial in the County Court, Westchester County, which has been delayed pending

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[2] The complaint in the District Court recited the following Jurisdictional basis:

"JURISDICTION

The jurisdiction of the Court over the complaint arises under Title 28, U.S.C. §§ 1331(a), 1343(3) and (4), 2201, 2202 and 2281; Title 42, U.S.C. § 1981 et seq. and under the Constitution of the United States and, in particular, the First, Fifth, and Fourteenth Amendments thereto.

The amount in controversy, exclusive of interest and costs, exceeds the sum of $15,000,000."

Subsequent to the decision in the Court of Appeals, the District Court entered an order on October 20, 1969, granting a motion by the District Attorney to dismiss the complaint. This was not inconsistent with the decision in the Court of Appeals on the interlocutory issue because the complaint sought only an injunction against prosecution and not return of the films. Indeed, the District Attorney had urged unsuccessfully in the Court of Appeals that the District Court had correctly denied the motion for return of the films because the interlocutory relief asked was not within the four corners of the prayer for permanent relief in the complaint, if for no other reason. In any event, counsel for Steinberg and 208 Cinema, Inc. has indicated that he will forthwith move in the District Court to amend the complaint to ask for return of the films as part of the permanent relief sought.

[3] On cross appeal by the District Attorney from that part of the District Court decision ordering return of the two films not named in the warrant, the Court of Appeals affirmed. The petitioner does not seek review of that part of the decision of the Court of Appeals. In addition, the petitioner does not seek review of that part of the decision directing a return of the lenses.

determination of this matter, with the consent of the District Attorney.

Throughout these proceedings there has been a consistent pledge by the District Attorney that the seizures are for the purpose of evidence only and not suppression, and that if Steinberg obtained duplicate prints of the seized films and again showed them they would not be seized.

Prior to the determination in the Court of Appeals, Steinberg's motion to suppress evidence in the County Court was denied with respect to the films here at issue and that decision, in conflict with the decision of the Second Circuit, still stands.

Reasons for Granting the Writ

a. The decision of the United States Court of Appeals is unsupported by the decisions of this Court, and is in apparent conflict with recent decisions by this Court.

The decision of the Court of Appeals is unsupported by the decisions of this Court. Respondents[4] place their principal reliance upon *A Quantity of Books* v. *Kansas*, 378 U. S. 205 (1964). In that case, the State acted on a procedure obviously designed to prevent the dissemination of obscenity by the very act of the seizure itself. *A Quantity of Books* was primarily a civil foreclosure situation. In that context, this Court held that the seizure prior to an adversarial determination of obscenity was improper. This Court carefully laid down the criteria for such a procedure. The Court said, "*It is our view that since the warrant here authorized the sheriff to seize all copies of the specified titles and since P-K was not afforded a hearing on the question of the obscenity even of the seven*

[4] Petitioner is authorized on behalf of the respondent Police Chief to state that he supports the position of the petitioner and references herein to respondents relate to Steinberg and 208 Cinema, Inc.

novels before the warrant issued the procedure was likewise constitutionally deficient." (Emphasis added, footnotes omitted.) 378 U. S. at 210. Therefore, in addition to the civil nature of the proceeding and the fact that seizure was the ultimate instrument of public policy, the further elements consisted not only of the lack of a prior adversarial proceeding but that lack, coupled with a massive seizure of material. This is radically different from the seizure of one item of each particular type for the purpose of use as evidence in an obscenity prosecution and there is no indication from *A Quantity of Books* that this Court had any intention to prohibit such seizure upon ordinary search warrant practice.

In the principal lower court case relied on in the Court of Appeals, *Metzger* v. *Pearcy,* 393 F. 2d 202 (7th Cir. 1968), there was no petition for certiorari, and there has been no petition by the prosecution in either *Tyrone, Inc.* v. *Wilkinson,* —— F. 2nd —— (4th Cir. 1969) or *Bethview Amusement Corp.* v. *Cahn,* —— F. 2nd —— (2nd Cir. 1969).

While the decision below is not in conflict with those other circuits which have considered the issue, see *Metzger* v. *Pearcy, supra,* and *Tyrone, Inc.* v. *Wilkinson, supra,* there does appear to be a strong conflict between that decision and the clear implications of two recent decisions by this Court.

In *Mishkin* v. *New York,* 383 U. S. 502 (1966), in affirming the judgment of the New York Court of Appeals, affirming an obscenity conviction, this Court at pages 512 *et seq.* determined that the issue of illegal seizure of the printed material there was not ripe for determination because it had not been adequately litigated below and therefore the record was inadequate. Petitioner there had sought to use the principle of *A Quantity of Books* and the lack of a prior adversarial proceeding. It is therefore significant to note some defects in the record that caused

this Court to decline to consider the issue. The Court said, "It is maintained that the seizure in the storeroom was made on the authority of a search warrant; yet neither the affidavit upon which the warrant issued nor the warrant itself is in the record. Finally, while the search and seizure issue has a First Amendment aspect because of the allegedly *massive quantity* [emphasis added] of the seizures, see *A Quantity of Books* . . . the record in this regard is inadequate. There is neither evidence nor findings as to how many of the total available copies of the books in the various book stores were seized. . . ." If the lesson of *Books* was "that law enforcement officers cannot seize allegedly obscene publications without a prior adversary proceeding on the issue of obscenity,"[5] it is difficult to see how the undetermined facts in the *Mishkin* record would have in any event been material to a determination on the legality of the seizure, nor indeed would the contents of the search warrant and affidavit have been material. The implication is inescapable that this Court does not understand the lesson of *Books* in the broad language that the 7th Circuit used.

Equally significant is the even more recent decision of *Lee Art Theatre, Inc.* v. *Virginia,* 392 U. S. 636 (1968). There the Court reversed the judgment of the Supreme Court of Appeals of Virginia and remanded the matter for further proceedings. The Court found that *Marcus* v. *Search Warrant,* 367 U. S. 717 (1961), was controlling because the material had not been scrutinized by the judge and the affidavit was conclusory. It, however, did not even go so far as to decide whether in a picture case, as distinguished from a book case, it would be necessary for the judge to view the film before issuing a warrant, recognizing difficulties with that and leaving the question open. If the seizure of a single print of film for use as evidence in

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[5] See *Metzger* v. *Pearcy, supra,* at 204.

an obscenity prosecution required a prior adversarial proceeding, not only would it be necessary for the Judge to view the film, but to do so in the context of the adversarial proceeding, and if *A Quantity of Books* applied to such a situation that question would not be an open one.

It is respectfully submitted that the apparent conflict between the decision of the Court below and the decisions of this Court leaves this important issue of law in a doubtful state and for this reason, if none other, Certiorari should be granted.

b. The decision below decides an important issue of Federal Constitutional law which should be decided by this Court.

The decision below followed *Metzger* v. *Pearcy*, 393 F. 2d 202 (7th Cir. 1968). It is true that that case involved a seizure of motion picture films. It is significant, however, to note that four different prints of the same film were seized and that the moving party was the distributor. (It is also significant to note that the film was "I, A Woman," a film ultimately adjudicated non-obscene and which, as pointed out in this case in oral argument in the District Court, played in Westchester County without any prosecution being commenced.) While the Court rejected the prosecution claim that a return of the evidence would prevent a successful prosecution, its holding is significantly blunted by the fact that it directed the plaintiff there to make available to the prosecution at its request one copy of the print for use in a criminal prosecution. Although a smaller quantity of items was involved than in *A Quantity of Books* or *Mishkin, supra, Metzger* still dealt with the issue of a massive seizure and still acknowledged in principle the exception of the retention of reasonable quantities of material, not for the purpose of suppressing dissemi-

nation but for legitimate use as evidence.[6] Similarly, in *Potwora* v. *Dillon,* 386 F. 2d 74 (2d Cir. 1967), the parties themselves distinguished the issue of massive seizure because the pleadings asked return only of those copies in excess of a reasonable number needed for evidence. The lower federal courts have thus struggled with this problem repeatedly, and have recognized the legitimate need of the prosecutor for *ex parte* seizure of true evidence.[7]

Bethview Amusement Corp. v. *Cahn, supra,* does add one new element. There the Second Circuit, apparently recognizing that massiveness was an element of the rule in *A Quality of Books,* sought to establish a new approach to this element in motion picture cases by observing that the seizure of a *single* motion picture is massive because of the number of potential viewers thus deprived of seeing the picture.[8] This analysis, however, fails to account

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[6] While *Cambist Films, Inc.* v. *Tribell,* 293 F. Supp. 407 (E. D. Ky. 1968), followed *Metzger,* that case was readily distinguishable on ordinary search warrant law in that the affidavit supporting the warrant contained only slightly more than conclusory allegations and the Court specifically noted that the magistrate did not view the film. Further, the film was seized in May, to be held for a Grand Jury which did not meet until October, and the substantial length of time during which the film was unavailable differentiates the case because in this case the petitioner is prepared for an immediate State trial, and it is the respondents that are seeking delay. Indeed, if counsel had commenced his motion practice in State Court earlier, the State trial could have already concluded and the appellate process have begun.

[7] See *e.g., Rage Books, Inc.* v. *Leary,* —— F. Supp. ——, 69 Civ. 847, Dec. #39584 (S.D.N.Y., July 1, 1969) (Pollack, D.J.). See also Glassman, "Should Search Warrants Be Issued Ex Parte in Obscenity Offenses?" N.Y.L.J. July 18, 1969, at p. 1.

[8] Even if this equation had support in law, nevertheless the Court of Appeals overlooked the fact that in the case at bar the respondents, in arguing originally in the District Court that the prosecution should be enjoined because the films were not obscene, attempted to demonstrate that the films were consistent with contemporary community standards by submitting affidavits and orally asserting that the seized films had played extensively in the area, causing Judge Pollack to comment on this claim in his decision on that first motion. (See appendix at p. 35. See also Record on Appeal, Item 8, Affidavit of Selma Trauhen.)

for the principal moving fact in *A Quantity of Books,* the fact that the seizure was for the purpose of suppression. While it is true that a seizure criminal in form has "at least the same potential restraints" as a civil seizure,[9] it does not follow that the purpose of the seizure is immaterial, particularly where there is a good faith effort to prevent indirect suppression. In the case at bar, the District Attorney has constantly pledged that duplicate prints, shown by the respondents, would not be seized. Certainly every seizure, no matter how minimal, has some suppressing effect, and yet it was not every seizure that *A Quantity of Books* would have preceded with an adversarial hearing but only massive seizure. Compare *Mishkin* v. *New York, supra.* In any event, this holding is not a simple application of *A Quantity of Books,* but a new rule of decision in a significant area of Federal Constitutional law, and as such should be passed on by this Court. This Court may take judicial notice of significant trends in the motion picture field in the United States. The problems and questions raised by the issues in this case will arise again and again before local prosecutors, judges and theatre operators and the granting of certiorari in this case would be of substantial benefit not only to the parties here, but to innumerable prosecutors, courts and theatre operators throughout the Nation.

Nor should the good faith of the prosecutor here be overlooked. The District Attorney of Westchester County acted throughout in a responsible and fairminded way

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[9] See *United States* v. *Brown,* 274 F. Supp. 561 (S.D.N.Y. 1967). In *Brown,* however, sixteen cartons containing obscene books were authorized to be seized. None of the contents of the cartons was submitted to the Commissioner for his perusal, and therefore there was no judicial determination preliminary or otherwise of obscenity prior to the issuance and execution of the warrant. Pursuant to the warrant, F.B.I. agents seized 419 cartons of obscene material. The massiveness of the seizure clearly indicated upon the facts of that case that there was a potential for prior restraint equivalent to civil forfeiture.

(see the opinion of Pollock, District Judge, appendix, *infra,* at pp. 39-40). The petitioner has done everything reasonably possible to obey the Constitution in enforcing the law. If there in fact is a Constitutionally punishible area of obscenity, there must be a Constitutionally permissible way of mounting an obscenity prosecution. If Constitutional interpretation, based not on Fourth Amendment procedural rights but on First Amendment substantive rights produces an insurmountable *procedural* barrier to what has been declared substantively permissible, there is of necessity a defect in the interpretation. In *Bethview, supra,* the Court below recognized this problem and attempted to offer a solution. The offered solution however is not only of doubtful practicality, but raises at least as many Constitutional problems as it solves. The Court said:

> "The appellants contend that a print of the motion picture is needed for purposes of prosecution. There are a number of ways in which this can be accomplished without seizure of the film. The court can direct that a print be made reasonably available to the prosecution; a subpoena duces tecum can be used.
>
> "Finally it is suggested that unless the police or other local authorities have actual possession of the film pending the required adversary proceeding, the distributor may take advantage of the delay, for example, by shipping the film out of the jurisdiction or by cutting out the offending scenes. If there is a real threat of such activity it can be controlled by an ex parte restraining order." (*id.,* at pp. 3356, 3357; see appendix, *infra,* at p. 29).

Until this Court speaks, that guideline will be followed by State prosecutors and State Courts in future cases, and obscenity cases will develop a unique criminal procedure all their own, relying in part on the precedents to be

found in *Howard's State Trials.* In this area alone will criminal prosecutions begin not with *ex parte* search warrants, but *ex parte* restraining orders and subpoenas or other process compelling defendants to cooperate with their prosecutors in their own prosecutions. Even if this attempted dispensation of local prosecutors from the provisions of the Fifth Amendment is permissible, there are still substantial practical defects in the approach indicated by the Second Circuit. The Court seems to doubt that there is a danger of defendants altering the evidence, but overlooks the fact that the burden is on the prosecutor to prove the unchanged nature of the evidence when it is offered in Court. An *ex parte* restraining order may issue, but how can it be determined and proved that no change has been made if the defendant has sole possession of the film? Would the Jury be apprised of the pretrial procedures? Would the defendant be required to admit that the film was unchanged in order to avoid contempt proceedings for violation of the restraining order? Could such a forced admission be used against him at trial? Would it not be better to permit an *ex parte* seizure, and then let the defendant elect whether to receive return of the film on a waiver and stipulation to the procedure above? Further, as the record here indicates, the basic concern of the theatre operator is not in the right of the public to view the seized film, but in his contractual obligation to return the film to the distributor.[10] Could this return be prohibited by the *ex parte* temporary restraining order? If not, would not the entire procedure be a nullity? Would a defendant who raised his Fifth Amendment rights in opposition to these procedures waive his right to possession of the film under the *Bethview* rule? Finally, under this rule, could not the *ex parte* restraining order and sub-

[10] Consider, *e.g.,* the fact that the first seizure here was on the last night of the scheduled showing. Actually, however, the real motive is often simply to obstruct the prosecution. See Appendix, *infra,* at page 19.

poena issue together with an order to show cause why a seizure warrant should not issue forthwith, and immediately after the adversarial hearing the seizure warrant issue? This would have no practical advantage to the defendant over the present procedure in State Law by which the defendant may now immediately move to controvert the search warrant or for the return of the items seized. (See New York Code of Criminal Procedure, §§807, 813c.)

The result in *Bethview* was not intended by *A Quantity of Books*, nor was the supposed evil to be prevented here commensurate with that under the Kansas Statute.

The potential impact of the Second Circuit decision in *Bethview* and the case at bar requires review by this Court, and the Nassau District Attorney's Office has advised your petitioner that certiorari will not be sought in that case. There can be few issues more needful of review in this area than that presented to this Court exclusively by this case.

C. Conclusion.

The seizure of single items of obscenity for use as evidence in a good faith criminal prosecution is substantially dissimilar from the seizure of massive quantities of obscenity for the purpose of destroying it and preventing its dissemination. A rule which requires prior adversary determination of the latter has no necessary application to the former. In any event, in view of the currency of this issue, it can fairly be said to be a constitutional issue of extreme importance which ought to be determined by this Court.

Conclusion

WHEREFORE, it is respectfully requested that the instant petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit be granted.

Respectfully submitted,

CARL A. VERGARI,
District Attorney of Westchester County,
Petitioner.

B. ANTHONY MOROSCO,
Senior Assistant District Attorney,
Of Counsel.

Dated: November 10, 1969

APPENDIX

(Opinion, *208 Cinema, Inc.* v. *Vergari*, U.S.D.C., S.D.N.Y. on Instant Motion)

McLean, *D.J.*

Plaintiff 208 Cinema, Inc. owns a motion picture theatre, the Capitol Theatre, in Port Chester, New York. Plaintiff Steinberg is its president and principal stockholder. On April 22, 1969 Steinberg was arrested and charged with showing obscene motion pictures at the Capitol Theatre in violation of Section 235.05 of the New York Penal Law. Pursuant to a search warrant, certain films, trailers, advertising material and projection equipment were seized by the Westchester County authorities.

On April 25, 1969 plaintiffs began this action. Their complaint asks that a three-judge court be convened and that that court declare Section 235.05 unconstitutional and restrain its enforcement. Despite the request in the complaint, no motion has been made for the convening of a three-judge court. Instead, plaintiffs moved for an injunction enjoining further arrests and prosecutions of plaintiff Steinberg pending the eventual disposition of this action. Judge Pollack denied that motion by opinion and order dated May 5, 1969.

Plaintiffs now move for an order directing the immediate return to plaintiffs of the films and other property seized by defendants. Plaintiffs contend that the seizure has violated their rights under the First and Fourteenth Amendments. Evaluation of this contention requires an examination of the undisputed facts relating to each seizure.

On April 18 and 21, 1969, an assistant district attorney of Westchester County, William H. McKenna, attended a performance at the Capitol Theatre and viewed two films then being exhibited. They were entitled "The Girl from Pussycat" and "Professor Lust". He also viewed a

"trailer" or preview of coming attractions entitled "Babette," "The King," "All Women are Bad," "I, a Woman," and "Carmen Baby".

Mr. McKenna then made an affidavit in which he described "The Girl from Pussycat" in considerable detail, and "Professor Lust" and the trailer in somewhat less detail. He submitted this affidavit to a county judge of Westchester County. The judge himself attended a performance at the Capitol Theatre on April 22, 1969 and viewed "The Girl from Pussycat," "Professor Lust," and the trailer. The judge thereupon issued a search warrant dated April 22, 1969 in which he stated that he had viewed the films and that he was satisfied that they violated both the state and federal obscenity and pornography laws. The warrant commanded the police to seize "any and all reels of motion picture film, including but not limited to" "The Girl from Pussycat," "Professor Lust," the trailer, advertising material and projection equipment. Pursuant to this warrant, the police immediately seized "The Girl from Pussycat," "Professor Lust," certain advertising material and projection equipment. The trailer was not available when the police visited the theatre. They also seized two other films which had not yet been exhibited at the treatre entitled "The King," and "All Women are Bad".

Steinberg was arrested and arraigned in the Village Justice Court of Special Sessions of Port Chester on an information charging obscenity in violation of Section 235.05 of the Penal Law. Subsequently, the case was presented to the Westchester County grand jury which, on April 25, returned an indictment against Steinberg on this charge.

On April 25, 1969 McKenna made another affidavit for another search warrant in order to seize the trailer. On April 25 the county judge issued a search warrant for its seizure. This warrant was immediately executed and the trailer was seized. This is how matters stood when this action was commenced.

Subsequently, there was another search and seizure. On May 10, 1969 McKenna made another affidavit in which

he recounted what he had observed when he attended the Capitol Theatre on May 8. On that occasion he viewed two films entitled "A Thousand Pleasures" and "Love is Where Its At," and a trailer of two coming attractions entitled "Sock It to Me Baby," and "Campus Heat". The affidavit describes these films and the trailer in nauseating detail. McKenna submitted this affidavit to a village justice in Port Chester who himself viewed the films and trailer, found them obscene, and then signed a warrant authorizing the seizure of "any and all reels of motion picture film including but not limited to" "A Thousand Pleasures" and "Love is Where Its At," and the trailer of "Sock It to Me Baby" and "Campus Heat". Pursuant to this warrant, these two films and the trailer were seized. No other films were seized. The district attorney proposes to seek a further indictment of Steinberg based on these films but has not as yet done so because of this pending motion.

We thus have a case in which the films that form the basis of the first indictment and those which presumably will be the basis of the second, were observed before they were seized, not only by the prosecutor, but also by a judge, who found them to be obscene.* It is true that the observation was at a regularly scheduled performance in the Capitol Theatre, not in an adversary judicial proceeding in court. It is hard to see how it would have been practical to arrange such a judicial hearing prior to seizure. By the time a hearing could be held after due notice to Steinberg, it is probable that the films would no longer be in his possession.

Although the ultimate objective of this action is a declaration that Section 235.05 of the Penal Law is unconstitutional, the likelihood of plaintiffs' success on that issue seems remote. It is still possible for a picture to be ob-

* This is not true of "The King" and "All Women are Bad." It would seem, however, that no indictment could be based upon those films in any case, for they had not been exhibited by Steinberg prior to their seizure.

scene. Obscene publications are not within the protection of the First and Fourteenth Amendments. *Roth* v. *United States*, 354 U. S. 476 (1957). The state should be entitled to prosecute people who exhibit pictures which are obscene. The description of the films involved in this case leaves little doubt that they fall within that category. They appear to be "hard core pornography" of the hardest core.

In a prosecution for obscenity, the best evidence as to whether or not a picture is obscene is the picture itself. Without it the prosecution of Steinberg will be seriously handicapped, if not rendered impossible. It appears that the purpose of this action and of this motion is to achieve that result. From the point of view of the public interest and the welfare of the people of Port Chester, that result would be undesirable. Only a clear showing of a violation of plaintiffs' rights under the First and Fourteenth Amendments would justify this court in countenancing it.

It is at least arguable that the granting of this motion would contravene 28 U.S.C. § 2283 which forbids a federal court to stay proceedings in a state court except as expressly authorized by Act of Congress. It could be said that to require the return of these films would be tantamount to a stay of the state criminal prosecution. The motion, however, does not literally seek a stay. Moreover, I believe that if the Constitution does require the return of these films, this court must direct their return and that Section 2283 must be interpreted accordingly.

In *Marcus* v. *Search Warrant*, 367 U. S. 717 (1961), a police officer, acting pursuant to a Missouri statute, signed a complaint alleging that appellant kept obscene publications for sale. On the strength of this complaint, a judge issued a search warrant authorizing the seizure of obscene materials. The police thereupon seized 11,000 copies of 280 different publications. Subsequently, the court held a hearing, decided that 100 publications were obscene and 180 were not, directed the return of the 180 nonobscene items and the burning of the 100 obscene ones. The Supreme Court held that this procedure violated the Four-

teenth Amendment because it "lacked the safeguards which due process demands to assure nonobscene material the constitutional protection to which it is entitled". 367 U. S. at 731. The Court emphasized that the warrants issued "on the strength of the conclusory assertions of a single police officer, without any scrutiny by the judge of any materials considered by the complainant to be obscene" (pp. 731-732). It also stressed the fact that as it turned out, 180 of the 280 publications were ultimately found not to be obscene.

A Quantity of Books v. *Kansas,* 378 U. S. 205 (1964), also involved a so-called "massive" seizure in a civil proceeding under a Kansas statute similar to the Missouri statute involved in *Marcus.* The state attorney general filed an information with the court stating that 59 novels identified by title were obscene and that "each of said books [has] been published as 'This is an original Nightstand Book.'" He attached copies of seven of the novels to his information. A judge spent 45 minutes scrutinizing the seven books. He then stated that they appeared to be obscene and "give this Court reasonable grounds to believe that any paperbacked publication carrying the following: 'This is an original Night Stand book' would fall within the same category . . .". He thereupon issued a warrant authorizing seizure of all copies of the 59 novels. Only 31 novels were found but a total of 1,715 copies of them were seized. Subsequently the court held a hearing, decided that they were obscene and directed that they be destroyed.

The Supreme Court held that these procedures violated the Fourteenth Amendment because they "were constitutionally insufficient because they did not adequately safeguard against the suppression of nonobscene books." 378 U. S. at 208. The Court further said:

> "It is our view that since the warrant here authorized the sheriff to seize all copies of the specified titles, and since P-K was not afforded a hearing on the question of the obscenity even of the seven novels be-

for the warrant issued, the procedure was likewise constitutionally deficient." (378 U. S. at 210)

Finally, the Court said that the fact that a hearing was eventually held did not save the order under review for:

> "[I]f seizure of books precedes an adversary determination of their obscenity, there is danger of abridgment of the right of the public in a free society to unobstructed circulation of nonobscene books." (p. 213)

Lee Art Theatre, Inc. v. *Virginia,* 392 U. S. 636 (1968), is the third Supreme Court decision which must be considered here. Unlike *Marcus* and *A Quantity of Books,* this was a criminal prosecution in the Virginia courts for exhibiting obscene motion picture films. The Supreme Court reversed the conviction of the motion picture exhibitor because the trial court had admitted in evidence films which the Supreme Court found to have been unconstitutionally seized. The brief per curiam opinion gives very few details. It states that:

> "The seizure was under the authority of a warrant issued by a justice of the peace on the basis of an affidavit of a police officer which stated only the titles of the motion pictures and that the officer had determined from personal observation of them and of the billboard in front of the theatre that the films were obscene." (392 U. S. at 636)

The justice of the peace did not view the films before issuing the warrant, hence the Supreme Court said that it need not decide whether he should have viewed them. The Court held that the procedure of issuing the warrant "solely upon the conclusory assertions of the police officer without any inquiry by the justice of the peace into the factual basis for the officer's conclusions" was invalid because it "fell short of constitutional requirements demanding necessary sensitivity to freedom of expression." 392 U. S. at 637.

Despite some of the broad language in these opinions, notably in *A Quantity of Books,* the actual holdings of these three Supreme Court cases does not require the granting of this motion. We are not dealing here with a wholesale massive seizure. We are not concerned here with books or magazines, but with motion pictures. It is less practicable to hold a preliminary judicial adversary hearing with respect to motion pictures than it is with respect to books and magazines. Most important, the procedure followed here was far more conducive to safeguarding the protection of nonobscene material than was the procedure in any of the three Supreme Court cases. Instead of the unsupported conclusory affidavit of a police officer, we have (1) detailed factual affidavits of an assistant district attorney, (2) personal observation by a judge of the very films that were seized. The judicial scrutiny here was much more careful than the 45 minutes which the judge in *A Quantity of Books* gave to looking at only seven titles out of 59 which he directed to be seized. Although *Lee* is not, of course, an express approval of the procedure followed here, it can be said at least to hint at such approval in the emphasis which it gave to the fact that the justice of the peace did not view the picture.

In my opinion, all that can reasonably be required to protect "sensitivity to freedom of expression" was done here, as far as the films and the trailers which were actually exhibited by Steinberg and actually observed by the county judge and the village justice are concerned. As to them, after considerable reflection and with full awareness of my duty to follow the Supreme Court, I have concluded that I am at liberty under the Supreme Court decisions to uphold the actions of the state officials in this case as within permissible limits under the federal Constitution.

This conclusion is contrary to that reached by the Seventh Circuit in *Metzger* v. *Pearcy,* 393 F. 2d 202 (7th Cir. 1968) and in a district court decision in that circuit, *Cambist Films, Inc.* v. *Illinois,* 292 F. Supp. 185 (N. D. Ill. 1968). In my opinion those decisions placed undue em-

phasis upon the language rather than the actual holding of *A Quantity of Books*. Those decisions are not binding upon me and I decline to follow them.*

This conclusion does not apply to the two films entitled "The King" and "All Women are Bad." Neither the assistant district attorney nor either of the judicial officers saw these films. Indeed, they had not even been exhibited at plaintiff's theatre. In my opinion they should not have been seized. The search warrant, in so far as it authorized seizure of films in addition to those actually observed by the prosecutor and the judge, was too broad.

As to the projection equipment, its seizure was authorized by Section 410.00 of the New York Penal Law. Apparently it was used to exhibit the films which were seized on April 22, 1969. I have upheld the seizure of certain of those films. It logically follows that the seizure of the equipment must also be upheld. There would seem to be no need for this equipment as evidence in the forthcoming criminal prosecution. Defendants may be willing to consent to its return, but I do not feel that I can compel it.

As to the advertising material, the record is not clear as to what this was or what it referred to. To the extent that these advertising displays referred to the films which were seen by the county judge or the village justice and found by them to be obscene, they may be retained by defendants. All other advertising material should be returned. The parties should be able to agree as to the material which falls in each category.

The motion is denied except as to the films entitled "The King" and "All Women are Bad," and the advertising material above mentioned, as to which the motion is granted.

Settle order on notice.

Dated: August 8, 1969

EDWARD C. MCLEAN
U.S.D.J.

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* See also *Cambist Films, Inc.* v. *Tribell*, 293 F. Supp. 407 (E. D. Ky. 1968).

(Decree of the Court of Appeals)

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the ninth day of October one thousand nine hundred and sixty-nine.

Present: HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
HON. IRVING R. KAUFMAN,
Circuit Judges.

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208 CINEMA, INC. and PHILIP STEINRERG,

Plaintiffs-Appellants,

v.

CARL A. VERGARI, District Attorney, Westchester County, and ERIC GELDART, Police Chief of the Village of Port Chester, New York,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed as to that portion of the order which directed the return of certain films and that that portion of said order which denied such relief as to other films be and it hereby is reversed with directions to enter the injunction there sought by the appellants with costs to be taxed against the defendants-appellees Carl A. Vergari and Eric Geldart.

A. DANIEL FUSARO,
Clerk.

(Decision Relied on by Court of Appeals)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 724—September Term, 1968.

(Argued July 24, 1969 Decided October 6, 1969.)

Docket No. 33799

BETHVIEW AMUSEMENT CORP., GEORGE HALL, RUTH BAKEY, CLYDE BRUCE, TOM CUCCAROLE and RICHARD HALBACK,

Plaintiffs-Appellees,

—v.—

WILLIAM CAHN, District Attorney for Nassau County, State of New York, RICHARD DELIN, Chief Assistant District Attorney for Nassau County, State of New York, JOHN LANG, Detective Sergeant, Nassau County Police Department,

Defendants-Appellants.

Before:

WATERMAN and HAYS, *Circuit Judges,*
and BARTELS, *District Judge.**

Appeal from an order of the United States District Court for the Eastern District of New York, Anthony J. Travia, *Judge*, directing defendants to return to plaintiffs a print of a motion picture film entitled, "Odd Triangle," seized by police officers under the control of the defendants as being obscene.

Affirmed.

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* Of the Eastern District of New York, sitting by designation.

MORTON ALPERT, New York, New York (Alpert & Rosenberg, New York, New York), *for Appellee Bethview Amusement Corp.*

JEROME S. RUBENSTEIN, New York, New York, *for Appellee Cuccarole.*

GEORGE D. LEVINE, Assistant District Attorney of Nassau County, Mineola, New York (William Cahn, District Attorney of Nassau County, Mineola, New York), *for Appellants.*

HAYS, *Circuit Judge*:

This is an appeal from an order of the United States District Court for the Eastern District of New York, directing the return to appellees of a print of a motion picture film entitled "Odd Triangle" seized by police officers under the control of appellants as being obscene. We affirm the order of the district court.

There is no controversy as to the facts. Bethview Amusement Corp. is the owner of a motion picture theater known as Bethview Theater located in Bethpage, Nassau County, New York. On May 6, 1969 the theater was exhibiting a film called "Odd Triangle." Nassau County police officers under the direction of appellants seized the film and arrested the plaintiffs, who were employees of Bethview. The appellees were charged with the crime of "Obscenity" under Section 235.05(1)(2) of the Penal Law of the State of New York. The police officers who seized the film and made the arrests had search and arrest warrants issued on the application of appellants by Judge Marchese of the District Court of Nassau County, who had seen the film before issuing the warrants.

The appellees brought an action in the United States District Court for the Eastern District of New York and in connection therewith sought a preliminary injunction order-

ing the return of the film. The defendants appeal from the injunction ordering the film's return.

We are not called upon to decide whether the film was in fact obscene. The only issue raised is whether the protection provided by the first amendment required that appellees be given an opportunity to be heard on the issue of obscenity before the film could be seized by the police. We hold that the first amendment as applied to the states by the fourteenth requires an adversary hearing in such a case.

There can be no doubt that a motion picture, like a book, is entitled to the protection of the first amendment. *Joseph Burstyn, Inc.* v. *Wilson,* 343 U. S. 495, 501-03 (1952); *Interstate Circuit, Inc.* v. *City of Dallas,* 390 U. S. 676 (1968); *United States* v. *A Motion Picture Film,* 404 F. 2d 196 (2d Cir. 1968). That protection includes the requirement that an adversary hearing be provided before the allegedly obscene works can be seized.

"We conclude that in not first affording ... an adversary hearing, the procedure leading to the seizure order was constitutionally defective. ... For if seizure of books precedes an adversary determination of their obscenity, there is danger of abridgment of the right of the public in a free society to unobstructed circulation of non-obscene books." *A Quantity of Books* v. *Kansas,* 378 U. S. 205, 210-11, 213 (1964). See also *Marcus* v. *Search Warrant,* 367 U. S. 717 (1961); *Potwora* v. *Dillon,* 386 F. 2d 74 (2d Cir. 1967).

Appellants argue that there is a difference between the seizure of a large number of books and the seizure of a single print of a motion picture film. We do not agree that the difference is legally significant. We are told that the Bethview Theatre has 300 seats. Assuming half of them to be occupied for four showings of a film each day for a week, over 4,000 individuals would see the film. Preventing so large a group in the community from access to a film is no different, in the light of first amendment rights, from preventing a similarly large number of books from being circulated.

We are supported in our view that the rule of the *Kansas* case is equally applicable to seizure of films by the recent decisions of sister circuits in *Metzger* v. *Pearcy*, 393 F. 2d 202 (7th Cir. 1968 and *Tyrone, Inc.* v. *Wilkinson*, —— F. 2d —— 4th Cir. 1969). In *Metzger* the court said at p. 204:

> "This analysis [of the Supreme Court cases] requires this court to hold unconstitutional the seizure of the fim 'I, a Woman' since there must be an adversary hearing on the issue of obscenity before a movie can be constitutionally seized."

The appellants contend that a print of the motion picture is needed for purposes of prosecution. There are a number of ways in which this can be accomplished without seizure of the film. The court can direct that a print be made reasonably available to the prosecution; a subpoena duces tecum can be used.

Finally it is suggested that unless the police or other local authorities have actual possession of the film pending the required adversary proceeding, the distributor may take advantage of the delay, for example, by shipping the film out of the jurisdiction or by cutting out the offending scenes. If there is a real threat of such activity it can be controlled by an ex parte restraining order.

Affirmed.[1]

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[1] The order of the district court prohibited exhibition of the film pending trial of the obscenity charge. Since there was no cross-appeal we express no opinion on this portion of the order.

(Opinion by Pollack, D.J., dated May 5, 1969 on Related Motion.)

APPEARANCES:

POLLACK, D. J.

The plaintiffs herein have moved by Order to Show Cause pursuant to Rule 65(a) and (b) of the Federal Rules of Civil Procedure for an order "staying the further arrests and prosecutions of the plaintiff herein until the eventual disposition of this action". This is the only relief requested or to be considered on this motion. See, Rule 7(b) Fed. R. Civ. P.*

The two plaintiffs in this case operate the Capitol Theatre in Port Chester, New York. This theatre is used primarily for the exhibition of motion pictures for profit and is owned by the corporate plaintiff, 208 Cinema, Inc.

The individual plaintiff Philip Steinberg is the president and principal stockholder of the corporate plaintiff.

The defendants are the District Attorney of Westchester County and the Police Chief of the Village of Port Chester, New York. Both are sued only in their official capacities.

Jurisdiction of the Court over the subject matter according to the complaint is asserted under 42 U.S.C. 1983, 28 U.S.C. § 1343 (Civil Rights), 28 U.S.C. § 2281 (Three-Judge Court) and 28 U.S.C. §§ 2201 and 2202 (Federal Declaratory Judgment Act). The complaint charges that the Obscenity Law of the State of New York, Penal Law §§ 235.00 and 235.05, is void on its face, and as applied to the plaintiffs, in that it violates the First, Fifth, Eighth and Fourteenth Amendments to the Constitution.

On April 22, 1969 the individual plaintiff was arrested and immediately brought before the Village Justice Court of Special Sessions, Village of Port Chester, where he was

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* "(1) An application to the court for an order . . . shall be be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. . . ."

arraigned on an information charging obscenity in violation of Section 235.05 of the New York Penal Law, which reads, in pertinent part, as follows:

> A person is guilty of obscenity when, knowing its content and character, he:
>
> (1) Promotes, or possesses with intent to promote, any obscene material; or
>
> (2) Produces, presents or directs an obscene performance or participates in a portion thereof which is obscene or which contributes to its obscenity.

The arrest resulted from the execution of a search warrant issued by the Honorable George D. Burchell, County Judge of Westchester County, upon the affidavit of William H. McKenna, Senior Assistant District Attorney of Westchester County, after Judge Burchell himself had viewed two films entitled "The Girl from Pussy Cat" and "Professor Lust" and a reel of coming attractions at the theatre. In executing the warrant, law enforcement officers under the supervision of the defendants seized the two films and in addition thereto, the lenses from both of the theatre's projectors together with advertisements and other papers. Also pursuant to the direction of the warrant, two other films, entitled "The King" and "All Woman are Bad", which had been scheduled for showing the following evening, April 23, 1969 were seized, having been among those advertised in the coming attractions viewed.

On April 25, 1969 the reel of film containing the coming attractions referred to was seized pursuant to a search warrant.

On April 25, 1969 the matter was presented to the Westchester County Grand Jury which returned an indictment against the individual plaintiff. This indictment is pending but the filing of it is waiting the disposition of the motion before this Court.

On Aprl 25, 1969 the complaint herein was filed and the plaintiff's attorney proceeding *ex parte,* presented an order to show cause for signature to bring on a motion for a preliminary injunction containing a provision for a temporary restraint of the defendants pending the hearing of the motion; the restraint sought was against further arrests and prosecutions. The Court struck the requested temporary stay from the order submitted and fixed the return day of the motion for the following Tuesday, April 29, 1969. The Court declined even to consider a temporary stay without notice to the defendants. Thereupon the plaintiffs' attorney undertook to give notice to the defendants or their attorneys to appear in Chambers on the following day on the application for a temporary stay.

The plaintiffs and the defendant District Attorney appeared in Chambers by counsel. Plaintiffs' counsel stated that he was not seeking the return of the films. The Court declined to issue a temporary stay pending the hearing of the motion and directed that any change in the relief requested should be delineated in writing in the motion papers. The defendant objected to receiving mere oral notice of oral claims on plaintiffs' behalf.

On April 29, 1969, the motion was fully argued and decision was reserved. The only additional legal paper filed by the plaintiffs was an affidavit setting forth information to show where and when the films in question had been exhibited in the State of New York and elsewhere in the United States. No expansion of the relief requested was indicated in any supplemental notice of motion.

Plaintiffs have, as yet, made no motion for an order convening a Three-Judge Court under 28 U.S.C. § 2281. Nor do the moving papers request the return to the plaintiffs of the films and lenses seized. Accordingly, the issues that would be raised by such applications are, as a matter of plaintiffs' choice, not before the Court at this time.

Plaintiffs filed a brief indicating that they seek a preliminary injunction which, in addition to enjoining the

defendants from further arrests and prosecutions of the individual plaintiff, would enjoin them from continuing with the prosecution now pending. The power of a federal court to issue such an injunction is doubtful. However, this additional request for relief was withdrawn by the moving parties in the course of the oral argument on the motion.

Thus, the only question properly presented to the Court at this time is whether plaintiffs have made the necessary showing for an order staying *further* arrests and prosecutions of the individual plaintiff until the determination of the action commenced by the filing of the complaint herein. The power of this Court to issue such an order is questionable.

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments. 28 U.S.C. § 2283.

Any injunction such as had been applied for here would substantially interfere with the prosecution and adjudication of the pending State court proceedings, as is amply demonstrated by the fact that the Grand Jury's indictment has not been filed out of deference to this Court. Cf. *Dombrowski* v. *Pfister,* 380 U. S. 479, 484 n. 2 (1965).

Just as prosecutors cannot, by an abuse of process, chill the exercise of essential First Amendment rights, *Dombrowski* v. *Pfister, supra,* so the federal judiciary cannot ordinarily chill the prosecution of *bona fide* State prosecutions.

> § 2283 forbids any federal injunction substantially interfering with the prosecution of a pending state proceeding unless an exception applies. [Citations] The question thus becomes whether the injunction issued by the district court came within one of the exceptions recognized by the statute.

Studebaker Corp. v. *Gittlin*, 360 F. 2d 692, 696 (2d Cir. 1966).

Plaintiffs have, in both their memoranda and oral argument, relied exclusively on 42 U.S.C. § 1983 as a purported exception to 28 U.S.C. § 2283. Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Plaintiffs contend that this statute authorizes an injunction, at least of future arrests and prosecutions of the individual plaintiff for conduct similar to that which brought about the pending prosecution, since the latter violates the First Amendment to the Constitution in that the subject films were not obscene as a matter of law.

Assuming but not passing upon plaintiffs' legal arguments, in this respect,** they do not advance plaintiffs'

** In *Studebaker Corp.* v. *Gittlin, supra,* the Court of Appeals continued, at 360 F. 2d 697:

> "A case does not fall within the statutory exception merely because another federal statute permits injunctive relief in general terms." See *Baines* v. *City of Danville,* 337 F. 2d 579 (4 Cir. 1964), *cert. denied,* 381 U. S. 939, 85 S. Ct. 1772, 14 L. Ed. 2d 702 (1965) (Civil Rights Act, 42 U.S.C. § 1983).

Thus the Court of Appeals has clearly intimated its preference for the view of "the majority of the circuits" that federal injunctive relief is unavailable to restrain *pending* state prosecutions allegedly violating rights protected by 42 U.S.C. § 1983. *Id.* at 697, n. 4. This Court does not hold, as part of its decision in the instant case, that federal injunctive relief is unavailable to restrain *future* state prosecutions which would allegedly violate the same rights. However, a State court determination of such issues in the first instance seems to be preferred.

cause since it has not been shown, with the degree of probability requisite to success on this motion, that the films are not obscene as a matter of law.

Obscenity is defined, for First Amendment purposes, in the following terms:

> [W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.
>
> *Roth* v. *United States*, 354 U. S. 476, 489 (1957). Under this definition, as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.
>
> *Memoirs* v. *Massachusetts*, 383 U. S. 413, 418 (1966).

Certainly no showing of the films in question has been made available to this Court. Indeed, plaintiffs argue that it is not necessary to view the films in order to pass upon their lack of obscenity.

Plaintiffs have cited no case, however, which has held that the displaying of these particular films was protected by the First Amendment. What they attempted to do was to demonstrate that these films were not obscene by "contemporary community standards", in part, by proving that they have been shown elsewhere in New York and in the United States without arrests, prosecutions, or other restraints. This offer of proof is not persuasive since prosecutorial discretion cannot control a judicial determination, either in this Court or in the State courts.

Also relating to "contemporary community standards", plaintiffs have alluded to decisions protecting or allowing the showing of films which are more uninhibited in displaying nudity and sexual matters than the films in question here. The approval for entry into this country of the subject film in *United States* v. *A Motion Picture Film Entitled "I am Curious-Yellow"*, 404 F. 2d 196 (2d Cir. 1968), however, does not aid plaintiffs' cause since two of the learned judges on the Bench that decided that case (Friendly, J., who concurred, and Lumbard, Ch. J., who dissented) were of the opinion that the film was offensive to contemporary community standards. Judge Friendly concurred because the film was not wholly without redeeming social value. Nor does approval of the showing of *"I, A Woman"* serve plaintiffs any better. The affidavit of Mr. McKenna, upon which the first search warrant was issued, indicates that only the "most shocking sexual episodes" of this film were included in the reel of coming attractions. This bit of editorialization may have deleted the very matter which made the actual feature film permissible matter for public display.

In sum, there is sufficient question here of the obsenity of these films to warrant that issue being decided in the first instance by the State courts.

However, the plaintiffs have asserted an alternative ground for the injunctive relief they seek. Plaintiffs claim that they are being harassed by a bad faith prosecution against the individual plaintiff, brought solely to discourage the display of non-obscene but "frank" films. They further claim that 42 U.S.C. § 1983 authorizes this Court to enjoin threatened prosecutions in such circumstances.

The Supreme Court has ordered that an injunction be issued where the free exercise of First Amendment rights was being chilled by prosecutions not pending at the time the federal action was commenced, as well as by the threat of further prosecutions in the future, all under a state statute which was void on its face for vagueness. *Dom-*

browski v. *Pfister,* 380 U. S. 479 (1965). However, plaintiffs have, at least for purposes of the present motion, conceded that the relevant state statute is valid on its face, such issue being more properly raised on a motion to convene a Three-Judge Court.***

On this view of the case, it is readily apparent that abstention may serve a legitimate purpose. The statute regulating speech is not attacked on its face. The only proper attack is launched at the motivation behind the bringing of a prosecution which cannot render the statute unconstitutional as applied because the subject films cannot be said to be non-obscene as a matter of law. Considerations of federalism temper

> the exercise of equitable power, for the Court has recognized that federal interference with a State's good-faith administration of its criminal laws is peculiarly inconsistent with our federal framework. It is generally to be assumed that state courts and prosecutors will observe constitutional limitations as expounded by this Court, and that the mere possibility of erroneous initial application of constitutional standards will usually not amount to the irreparable injury necessary to justify a disruption of orderly state proceedings. (Footnotes omitted) *Dombrowski* v. *Pfister,* 380 U. S. at 484-485.

*** Indeed, this Court would be hard put to hold that the applicable State statutes depart from the Supreme Court's definition of obscenity as quoted above. The definition of the word "obscene" as used in Section 235.05, under which the individual plaintiff is being prosecuted, is set out in Section 235.00 of the New York Penal Law as follows:

> 1. "Obscene." Any material or performance is "obscene" if (a) considered as a whole, its predominant appeal is to prurient, shameful or morbid interest in nudity, sex, excretion, sadism or masochism, and (b) it goes substantially beyond customary limits of candor in describing or representing such matters, and (c) it is utterly without redeeming social value. . . .

In *Dombrowski*, it was clear that defense of the state criminal prosecution pending at the time of appeal would not assure adequate vindication of constitutional rights, and, thus, abstention was inappropriate.

> We hold that the abstention doctrine is inappropriate for cases such as the present one where ... statutes are justifiably attacked on their face as abridging free expression, or as applied for the purpose of dicouraging protected activities.
>
> First, appellants have attacked the good faith of the appellees in enforcing the statutes, claiming that they have invoked, and threaten to continue to invoke, criminal process without any hope of ultimate success, but only to discourage appellants' civil rights activities. If these allegations state a claim under the Civil Rights Act, 42 U.S.C. § 1983, as we believe they do, ... the interpretation ultimately put on the statutes by the state courts is irrelevant. ... It would not alter the impropriety of appellees' invoking the statute in bad faith to impose continuing harassment in order to discourage appellants' activities, as appellees allegedly are doing and plan to continue to do.
>
> Second, appellants have challeneged the statutes as overly broad and vague regulations of expression. ... [I]t is readily apparent that abstention serves no legitimate purpose where a statute regulating speech is properly attacked on its face, and where, as here, the conduct charged in the indictments is not within the reach of an acceptable limiting construction. ... 380 U. S. 489-491.

It is thus not clear that a claim is stated under section 1983 where, although bad faith is alleged, the federal petitioner is charged in the State court with conduct which is constitutionally indictable.

Laying aside such questions, however, it is quite apparent, even from the authorities cited by the plaintiffs,

that they assume an extremely heavy burden if they hope to prevail on the issue they raise by their attack upon the good faith of state officials. *Carmichael* v. *Allen*, 267 F. Supp. 985, 996-997 (N. D. Ga. 1967). In this burden they have failed and, for that reason, their motion must be denied.

The plaintiffs' claim of bad faith on the part of the defendants rests on their contentions that: (1) the seizures of films and other materials was illegal, for lack of prior notice and of an adversary hearing on the issue of obscenity; (2) the prosecution has no hope for success on the issue of obscenity since the films have been so widely shown and others like these films have been sustained in the courts; and (3) the raid on plaintiffs' theatre was "politically motivated" as a response to public pressures, as demonstrated by the fact that the members of the press were notified in advance and allowed to accompany the law enforcement officers when the first warrant was executed. Suffice it to say that these contentions fail to indicate a prosecution commenced solely to harass and without regard to eventual success or failure.

Indeed, there is ample evidence that the District Attorney might even have been considered remiss in his duty to conserve the public interest had he not proceeded with the diligence he has exhibited. At every stage, the prosecuting authorities chose between the options available to them under State laws with respect to the manner of their proceeding in a way calculated to produce the most responsible, fair and non-prejudicial determination and result. Assistant District Attorneys viewed the films in their entirety before applying for any warrant. Before the warrant was issued, both the District Attorney and the County Judge viewed the films. The individual plaintiff was, upon arrest, immediately arraigned. Though he demanded an immediate trial he was given an adjournment to obtain counsel. In order to expedite the administrative problems in such a case as this and to insure a

result consonant with sound legal principles, the District Attorney exercised his option to submit the case to the Grand Jury so that trial could be had in the County or Supreme Courts. When the Grand Jury found its indictment, prior to the appearance of the District Attorney in the instant case, the District Attorney refrained from having the Grand Jury file the indictment, although this Court had declined to order a stay pending oral argument.

Quite apart from the failure of plaintiffs to demonstrate, with a high degree of probability, that they are able to prove defendants' bad faith, and despite the evident validity of the charge of obscenity levied at the films involved here, plaintiffs lack grounds for the extraordinary injunction they seek against further arrests and prosecutions. Such an injunction would intrude not merely upon prosecutorial discretion but also upon the adjudication of a pending State court criminal proceeding. Such an intrusion upon state criminal processes is permissible only "in those exceptional cases" where the injunction is required "to prevent irreparable injury which is clear and imminent" or where the danger of such injury is both great and immediate. *Douglas* v. *City of Jeanette*, 319 U. S. 157, 163-164 (1943). And see *Zwickler* v. *Koota*, 389 U. S. 241, 253 (1967); *Dombrowski* v. *Pfister*, 380 U. S. 479, 485 (1965); *Stefanelli* v. *Minard*, 342 U. S. 117 (1951); *Pugach* v. *Dollinger*, 277 F. 2d 739 (2d Cir. 1960), *aff'd* 365 U. S. 458 (1961). Plaintiffs do not meet these tests and this is also sufficient grounds for denying plaintiff's motion for a preliminary injunction. On such a motion, probable success on the merits is one of the considerations for the Court and it has particular importance when there is no clear showing of threat of irreparable injury. *Dino de Laurentiis Cinematografica, S.p.A.* v. *D-150, Inc.*, 366 F. 2d 373 (2d Cir. 1966); and see *Thompson* v. *New York Central R.R. Co.*, 351 F. 2d 137 (2d Cir. 1966).

Plaintiffs have, both in their brief and at oral arguments, abandoned their claim that the money damage now being

suffered by virtue of the seizures and threatened future arrests and prosecutions are not compensable as against the defendants. Their claim of irreparable injury is based primarily upon their argument that the First Amendment right of free dissemination of ideas is, basically, a right of the recipients of the ideas disseminated, the viewing public here. Cf. *Lamont* v. *Postmaster General,* 381 U. S. 301 (1965); *Snyder* v. *Bd. of Trustees of Univ. of Illinois,* 286 F. Supp. 927 (N. D. Ill. 1968).

Clearly, motion pictures are within the protection of the First Amendment. *Joseph Burstyn, Inc.* v. *Wilson,* 343 U. S. 495 (1952). However, it is hard to see why, if the public has a right to view the pictures here involved, that right is being irreparably injured by the temporary unavailability of those films in the particular theatre run by the plaintiffs.

Moreover, it is difficult to see how any injunction issued by this Court along the lines sought by plaintiffs would not, in effect, be a license for the defendant to exhibit any motion picture, regardless of content, free from prosecutions or arrests by the defendants. Such an injunction would, in essence, invalidate the State statute on its face even though plaintiffs have expressly disclaimed such invalidity.

Accordingly, plaintiffs' motion is denied. The foregoing shall constitute the findings of fact and conclusions of law required by Rule 52(a) of the Federal Rules of Civil Procedure.

So Ordered.

May 5th, 1969.

Milton Pollack,
U. S. D. J.

(Affidavit of William H. McKenna, in Support of Search Warrant, dated April 22, 1969.)

COUNTY COURT,

WESTCHESTER COUNTY.

IN THE MATTER

of

THE APPLICATION FOR A SEARCH WARRANT OF A CERTAIN PREMISES AND OF CERTAIN PERSONS.

STATE OF NEW YORK }
COUNTY OF WESTCHESTER } ss.:

WILLIAM H. MCKENNA, being duly sworn, deposes and says I am a Senior Assistant District Attorney of the County of Westchester and I am presently engaged in an investigation into violations of Article 235 of the Penal Law concerning illegal possession and promoting of obscene material. Based upon the facts hereinafter set forth there is probable cause to believe that a search of The Capitol Theatre on Westchester Avenue in the Village of Port Chester and the persons hereinafter identified will disclose obscene material and related evidence possessed in violation of Article 235 of the Penal Law.

The Capitol Theatre is a large movie house in the Village of Port Chester which, some time ago undertook a program of displaying, what amounts to, underground movies which, I believe, fit within the definition of obscene as set forth in Section 235 of the Penal Law. Two pictures are featured currently entitled "The Girl From Pussy Cat" and "Professor Lust". These pictures are being shown daily and have been shown since April 16, 1969 and they

are both scheduled to be shown this date, April 23, 1969, commencing at approximately 1800 hours. As described hereinafter, I believe the motion pictures satisfy the New York State description of obscenity as well as the standard of the United States Supreme Court, namely: (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.

The attempted story line in "The Girl From Pussy Cat" concerns four girls who plan and ultimately rob a bank. It will be apparent from my description of the movie as hereinafter set forth that there is no theme to the picture; there is actually no story and the bank robbery episode is merely a contrived vehicle upon which to hang a continuous series of sexual episodes dealing with heterosexual and homosexual activities, none of which bear any relation to the previously referred to "story" but are "lugged in" for their prurient appeal.

The movie is approximately 65 minutes long with the sexually oriented episodes consuming all but approximately 10 minutes of the film. The first picture on the screen is that of a male mouthing a female breast, a close-up. This is followed by an obviously fictitious list of screen credits to names such as Gay Lamour, Fanny Rickles, Genevieve Wilde, Ethel Titus and Roman Hans. At 1943 hours on April 21, 1969 the picture itself began with a nude, gyrating female (hereinafter referred to as female #1) sitting astride a male's genital area. The subjects are in a coital position (the expression "coital position" is hereinafter used to refer to any position in which the genital areas of any two individuals, male or female, are in juxtaposition). At 1945 hours the scene switches to another apartment in which there are four females discussing a bank robbery. Female #4 departs, female #1 arrives and then female

#3 departs leaving female #1 and female #2 alone in the room. Commencing at 1946 hours, females #1 and #2 begin undressing each other and begin lesbian activities which continue with intermittent flashes to different locations for approximately 15 minutes of the film. During this 15 minute period there are flashes to female #3 and an unknown male nude in bed, coital position, with simulated oral genital activity. There are flash backs to female #3 having sexual relations with another male. There is a flash back to the first male seen initially at the very beginning of the movie having sexual relations with female #5. Flash back follows at 2001 hours to an unknown male and female #3 undressing completely and simulating intercourse. From 2004 up to 2006 hours female #1, 2, 4 and 5 discuss the commission of the bank robbery, committing the bank robbery and return to the apartment. At 2006 hours all four undress and phone call is made to some unknown males who soon arrive at the apartment. From 2006 hours until the end of the movie at 2044 hours there continues a montage of sexual gratification, homosexual and heterosexual, which is interrupted while females #1 and #2 attempt to prevent male #1 from going to the police by (a) beating him with a belt, (b) placing a (presumably) heated screwdriver to the sole of his bare foot and (c) forcing his hands into a connected toaster. This sadistic interlude lasts for less than five minutes at which point this male is saved by female #5 who immediately undresses and proceeds to have intercourse (simulated) with male #1. The movie ends abruptly without even a transparent attempt at a theme, message or purpose, the entire effect of which is to appeal exclusively to prurient interests, having presented exclusively various forms of sexual gratification.

The second feature "Professor Lust" deals with a demonic Jeckyl-Hyde type professor whose business is providing sexual gratification. The picture is replete with nudity, overt explicit acts of lesbianism as in the previous movie and is without any theme.

At the completion of both movies the coming attractions were shown which were exclusively of an obscene and sadistic nature, culling apparently from future productions the most salacious episodes concentrating in detail on female private parts and nudity in general, emphasis on sadism, masochism which goes well beyond customary limits of candor in describing and representing such matters. The coming attractions, among others, are the following pictures: "Hail to the King" which is based upon and deals primarily with lesbianism. The next picture "All Women are Bad" depicts masochism and numerous scenes of male and female sexual activity. The most shocking sexual episodes of the two films "I, a Woman" and "Carmen Baby" are then presented. Another film "Babette" shows scenes of flagellation and lesbianism. The final coming attraction is for the movie "Honey" which is advertised by additional scenes of nudity showing private parts and sexual activity. Based upon the nature of the scenes depicted of the coming attractions which are exclusively devoted to sexual acts, I believe this constitutes pandering in its most flagrant form. In addition the posters in front of the theater and the newspaper advertisements suggest nudity and sexual activity as being the principal subject matter of the motion picture.

I have been informed by members of the Port Chester Police Department that the operator of the Capital Theatre whom I have personally seen at each of two obscene performances I have attended is one Philip Steinberg. I have also seen at each performance a male identified to me by members of the Port Chester police as the manager of the theater and known as Louis Besignano.

Based upon the foregoing facts I believe that the operator and manager of the Capital Theatre is guilty of obscenity as defined in Article 235 of the Penal Law and that the projection equipment and obscene material come within the definition of Article 410 of the Penal Law and are subject to seizure and foreclosure by the District Attorney,

both pursuant to this Section and as contraband and instrumentalities of the aforementioned crime. It is emphasized in the above references to sexual activity and coital position at least one of the parties in each instance was completely nude with the partner either being completely nude, as in most cases, or clad in panties or brief shorts. In all cases the completely nude party was the female.

WHEREFORE your deponent respectfully requests the court issue a Search Warrant and Order of Seizure in the form annexed for the items of property set forth in the attached warrant.

(Sworn to by William H. McKenna on April 22, 1969.)

(Affidavit of William H. McKenna, in Support of Search Warrant, May, 1969.)

COURT OF SPECIAL SESSIONS,

VILLAGE OF PORT CHESTER.

IN THE MATTER

of

THE APPLICATION FOR A SEARCH WARRANT OF A CERTAIN PREMISES AND OF A CERTAIN PERSON.

STATE OF NEW YORK
COUNTY OF WESTCHESTER } ss.:

WILLIAM H. MCKENNA, being duly sworn, deposes and says I am a Senior Assistant District Attorney of the County of Westchester and I am presently engaged in an investigation into violations of Article 235 of the Penal Law concerning illegal possession and promoting of obscene material. Based upon the facts hereinafter set forth there is probable cause to believe that a search of The Capitol Theatre on Westchester Avenue in the Village of Port Chester and the persons hereinafter identified will disclose obscene material and related evidence possessed in violation of Article 235 of the Penal Law.

The Capitol Theatre is a commercial movie house in the Village of Port Chester which recently undertook a program showing motion pictures predominantly devoted to the exploitation of sexual matters and identified in the theater's advertisements as "exploitation films". Two pictures are featured at the present time entitled "A Thousand Pleasures" and "Love Is Where It Is At". These pictures are being shown daily and have been shown

since May 7, 1969 and are scheduled to run on a daily basis up to and including the 13th day of May, 1969. The performance is scheduled to begin at 1800 hours daily with weekend matinees. As hereinafter described, I believe, that these motion pictures satisfy the New York State description of obscenity as well as the standards of the United States Supreme Court, namely: (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.

The basis for the foregoing opinion as to the films' obscene and pornographic content will be set forth below. However, both pictures are devoted primarily to the explicit presentation of almost all forms of sexual activity, with the film "A Thousand Pleasures" being devoted to sadism, masochism, and both homosexual and heterosexual contacts.

I was present in The Capitol Theatre on Westchester Avenue at 1800 hours on May 8, 1969 and viewed in its entirety both pictures which were preceded by a "trailer" consisting of two coming attractions for the two movies "Sock It To Me Baby" and "Campus Heat" advertised as pictures soon to be seen in the Capitol Theatre. These coming attractions are exclusively confined to graphic presentations of homosexual and heterosexual activity consisting of acts of apparent or simulated intercourse between nude and semi-nude men and women and lesbian activities between females showing fondling, caressing and kissing between girls who are at all times nude from at least the waist up. These coming attractions, because of their being exclusively confined to depicting sexual activity between nude and semi-nude males and females, establish the fact that Philip Steinberg, admitted owner and operator of the theater, is appealing solely to a prurient interest

in sex and that such "advertisement" constitutes pandering. The present policy of the Capitol Theater and consequently the policy of Philip Steinberg has been in effect for approximately five weeks. Steinberg admitted in my presence and the presence of his attorney, volunteering the remark, that the present pictures are being shown only because he couldn't make any money showing "regular movies". The pictures being shown at the present time do not show any male private parts. Consequently, where appropriate, the sexual act being committed on the movie screen (as well as those shown in the past) is qualified by use of the word "simulated" or "apparent". This is done only because the camera angle and film editing is such that actual genital penetration is not shown. Therefore when a naked male and female couple are in coital position with accompanying kissing, breast fondling and pelvic movement, the described act of intercourse is qualified by the above language. The same qualification is attached to acts of sodomy and masturbation.

As a result of showing obscene films in this same theater from April 16, 1969 to April 22, 1969 a search warrant was issued on the latter date by the Honorable George Burchell, County Court Judge of Westchester County. A copy of that search warrant and its supporting papers is attached hereto and incorporated herein by reference. As a result of evidence seized pursuant to this warrant and sworn testimony the defendant has been indicted by a Grand Jury of Westchester County for the showing of obscene films and the possession of obscene films with the intent to show them, this conduct being actionable under Article 235 of the Penal Law of the State of New York. A single reel of film consisting of six coming attractions was seized pursuant to a search warrant on April 25, 1969, this reel also being made the subject of Grand Jury deliberation. The description of the two films presently being shown together with the coming attractions is hereinafter set forth and as described, the picture *A Thousand Pleas-*

ures is immeasurably more obscene and offensive than any picture seized as evidence in the above proceedings. In this picture, the sexual episodes, in addition to dialogue, are augmented by background monologue by a participant in the erotic scene being depicted relating, in a sensual manner, a description of the act being performed with its psyco-physical reaction.

On May 8, 1969 the coming attraction to "Sock It To Me Baby" began at 1800 hours, the following scenes were shown: 1) a nude female caresses her bare breasts as a second undresses, 2) a female in bed clad only in panties having her breasts fondled and kissed, 3) a nude standing female from the back apparently being kissed by someone seated in front of her, 4) a male and female lying on the floor apparently having intercourse, 5) four females do a sequential strip down to panties while dancing to rock and roll music, breasts exposed, 6) female nude from waist up does gyrating dance with male and 7) male fondling the genital area of a fully clothed female. The second coming attraction "Campus Heat" began at 1806 and showed the following scenes: 1) a male fondling a fully nude female, her private parts exposed, 2) a narrator describing the film as the "intimate details of the sex revolution", showed the following scenes: 1) a male fondling a fully nude from the waist up, 4) male and female nude from waist up with male hand inside panties on pubic area and 5) two nude females, one lying on the other engaging in lesbian sexual contact. This coming attraction lasted four minutes.

The first film "A Thousand Pleasures" begins at 1810 hours. Generally, the film deals with a man (hereinafter referred to as male #1) held captive by a colony of lesbians. There are six females with active roles (a seventh, the wife of male #1 has a passive role, she is being stabbed in the back and killed by her husband at the start of the film) and a second male (hereinafter referred to as male #2) does the work for the females. Male #1 puts his wife's body in the back of his station wagon (California

license plates) and drives away looking for a place to dispose of the body. He picks up females #1 and #2 who are hitch-hiking and they get in the front and back seat respectively. The next scene sets the mood and tone for the rest of the film. Female #1 unzips the driver's fly and reaches inside his pants and lowers her head to his genital area. He says "You can't do that here", to which she responds, "You'll like it and besides, I haven't had lunch yet". The camera then shows a close-up of the female's face while she "apparently" commits an act of oral sodomy at the conclusion of which she sits upright and licks her lips. During the sequence the camera shows his facial reaction. Immediately prior to this scene the screen credits are given while a fully nude female dances before a mirror, her private parts exposed. At 1817 hours male #1 walks into room at girls' house. Female #3 and #4 are present. Female #3 is a fully grown and matured woman with the apparent mental age of an infant who, throughout the picture wears diapers or nothing at all. She is referred to as "Baby". Brief reference will be made to the more shocking scenes in the film. A scene followed in which male #1 watches female #3 (baby) nude, fondling herself in front of a mirror with her private parts exposed. She then takes a candle and apparently inserts it in her private parts. After apparently masturbating male #1 is seen reaching between her legs and withdrawing the candle. This scene lasts over five minutes and ends with male #1 fondling female #3's breasts. After an unsuccessful escape attempt male #1 regains consciousness with females #1 and #2 standing fully nude over him. A scene is then shown of two females (#1 and #5) engaged in lesbian sexual activity on a dining room table. The private parts of both females are exposed as female #1 provides a commentary on the episode being shown. She asks for a contraceptive and apparently masturbates male #1 for the stated purpose of artificially inseminating one of the girls in order to perpetuate the lesbian colony. A scene follows showing sex-

ual activity between male #1 and a fully nude female #6, her private parts exposed. The next scene is the longest in the movie and in it female #3 is forced to draw milk from a lactating breast. While nursing she is constantly being whipped by another female. During this episode, and in the same room, male #1 undresses female #6 and they engage in sexual activity. The scene ends after the continued whipping when a female take a poker from the fireplace tools and thrusts the point of it at the exposed buttocks of female #3. Contact is not shown but a close up of female #3's face shows her vomiting milk. After another unsuccessful escape try male #1 is tortured by two females, first by being severely beaten with a fireplace tool and then having his feet put into a fire. When he regains consciousness he removes a straight razor from his pocket, crawls upstairs and slashes the throats of females #1, #2 and #3 (2). He is caught by male #2 who ties him to a bed at which point he becomes the victim of an unorthodox homicide. Female #6 closes his nasal passages, forces her bare breast in his mouth and suffocates him, the producer of the film apparently overlooking the fact that this victim of mammary suffocation narrates part of the film. The picture ended at approximately 1919 hours with females #4 and #6 prepared to resume their lesbian relationship.

The second feature "Love Is Where It Is At" began immediately with the screen credits being painted on the nude body of a female. The story is about a female who goes to a private investigator for protection against her husband who has just escaped from jail. The detective eventually shoots and kills the escaped felon but the search did little to distract him from participating in a series of explicitly depicted sexual episodes. There are numerous scenes with nude females, the first of which (aside from the host for the screen credits) takes place in a "strip-joint" supposedly in New York City. The episode ends with the detective having intercourse with the nude "stripper" on

the floor of her dressing room. He then interrupts two lesbians engaged in sexual activity, starts participating with one of the girls himself and is finally forced out of the apartment by the second girl, leaving them both in bed. He then attends a party attended by nude females and partially nude males. He chases and kills the husband and the picture ends with the detective engaging in approximately five minutes of sexual activity with the completely nude wife during which an act of apparent intercourse is shown. The flimsy story line is an obvious device used merely for the purpose of presenting a variety of flagrant sexual conduct that bears no relationship to story, plot development or characterization (non-existent) but which is shown only for its prurient appeal.

Based upon the foregoing facts I believe that Philip Steinberg is guilty of obscenity as defined in Article 235 of the Penal Law.

WHEREFORE your deponent respectfully requests the court issue a Search Warrant and Order of Seizure in the form annexed for the items of property set forth therein.

.....

Sworn to before me this
day of May, 1969

.....
Village Justice.

Constitutional and Statutory Provisions

United States Constitution

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * *

New York Penal Law, Article 235
in effect prior to September 1, 1969
(subsequently amended)

See 39 McKinney's Consolidated Laws, Annotated 85-107 (1967).

§ 235.00 Obscenity; definitions of terms

The following definitions are applicable to sections 235.05, 235.10 and 235.15:

1. "Obscene." Any material or performance is "obscene" if (a) considered as a whole, its predominant appeal is to prurient, shameful or morbid interest in nudity, sex, excretion, sadism or masochism, and (b) it goes substantially beyond customary limits of candor in describing or representing such matters, and (c) it is utterly without redeeming social value. Predominant appeal shall be judged with reference to ordinary adults unless it appears from the character of the material or the circumstances of its dissemination to be designed for children or other specially susceptible audience.

2. "Material" means anything tangible which is capable of being used or adapted to arouse interest, whether through the medium of reading, observation, sound or in any other manner.

3. "Performance" means any play, motion picture, dance or other exhibition performed before an audience.

4. "Promote" means to manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit or advertise, or to offer or agree to do the same. L. 1965, c. 1030; amended L. 1967, c. 791, § 32, eff. Sept. 1, 1967.

§ 235.05 Obscenity

A person is guilty of obscenity when, knowing its content and character, he:

1. Promotes, or possesses with intent to promote, any obscene material; or

2. Produces, presents or directs an obscene performance or participates in a portion thereof which is obscene or which contributes to its obscenity.

Obscenity is a class A misdemeanor. L. 1965, c. 1030, eff. Sept. 1, 1967.

§ 235.10 Obscenity; presumptions

1. A person who promotes obscene material, or possesses the same with intent to promote it, in the course of his business is presumed to do so with knowledge of its content and character.

2. A person who possesses six or more identical or similar obscene articles is presumed to possess them with intent to promote the same. L. 1965, c. 1030, eff. Sept. 1, 1967.

§ 235.15 Obscenity; defense

In any prosecution for obscenity, it is an affirmative defense that the persons to whom allegedly obscene material was disseminated, or the audience to an allegedly obscene performance, consisted of persons or institutions having scientific, educational, governmental or other similar justification for possessing or viewing the same. L. 1965, c. 1030, eff. Sept. 1, 1967.

* * * *

NEW YORK CODE OF CRIMINAL PROCEDURE §§ 791-796, 807-809, 811-812, 813c

See 66 MCKINNEY'S CONSOLIDATED LAWS OF NEW YORK ANNOTATED 138 *et seq.* (1958) and 1968-69 POCKET PART 32 *et seq.* (1968)

§ 791. Search warrant, defined

A search warrant is an order in writing in the name of the people, signed by a judge, justice or magistrate, of a court of criminal jurisdiction, directed to a peace officer, commanding him to search for personal property, and bring it before the judge, justice or magistrate. As amended L. 1962, c. 542, § 1, eff. July 1, 1962.

See POCKET PART, *supra* at 32.

§ 792. Property subject to seizure under a search warrant

The following property may be ordered seized under a search warrant:

1. stolen or embezzled property;

2. property, the possession of which is inlawful;

3. property used or possessed with intent to be used as the means of committing a crime or offense or concealed to prevent a crime or offense from being discovered;

4. property constituting evidence of crime or tending to show that a particular person committed a crime.

The property described in this section, or any part thereof, may be seized from any place where such property may be located or from the person or possession or control of any person who shall be found to have such property in his possession or under his control. Added L. 1962, c. 542, § 2, eff. July 1, 1962.

Ibid.

§ 793. It cannot be issued but upon probable cause, supported by affidavit

A search warrant cannot be issued, but upon probable cause, supported by affidavit, naming or describing the person, and particularly describing the property, and the place to be searched.

See McKinney's, *supra* at 144.

§ 794. Examination of persons seeking warrant and witnesses

The person seeking the warrant shall appear personally before the judge, justice or magistrate who may, before issuing the warrant, examine, on oath, the person seeking

the warrant and any witnesses he may produce, and must take the affidavit or deposition of the person seeking the warrant. Any such affidavit shall be substantially in the form prescribed by section seven hundred ninety-seven-a of this code and shall contain the statements and information upon which such person relies to establish sufficient grounds for the issuance of the warrant. Such judge, justice or magistrate may in his discretion require in any case, that any witness upon whom the person seeking a search warrant relies for informaion appear personally and be examined concerning such information. As amended L. 1962, c. 542, § 3, eff. July 1, 1962.

See POCKET PART, *supra* at 44.

§ 795. Affidavits or depositions, what to contain

The affidavits or depositions must set forth the facts, information and circumstances tending to establish sufficient grounds for granting the application, and probable cause for believing that such grounds exist. As amended L. 1962, c. 542, § 4, eff. July 1, 1962.

See *id.* at 45.

§ 796. When warrant to be issued

If the judge, justice or magistrate be satisfied of the existence of sufficient grounds for granting the application, and that there is probable cause to believe their existence, he must issue a search warrant, signed by him with his name of office, to any peace officer in his county, or to any peace officer in the city of New York if such warrant is issued in the city of New York, commanding him forthwith to search the person or place named, for the property specified, and to bring it before the judge, justice or magistrate. As amended L. 1962, c. 542, § 5, eff. July 1, 1962.

Ibid.

§ 807. Contravention of warrant

If the grounds on which the warrant was issued be controverted, the judge, justice or magistrate must take testimony in relation thereto. As amended L. 1962, c. 542, § 12, eff. July 1, 1962.

See *id.* at 54.

§ 808. Testimony, how taken and authenticated

The testimony given by each witness must be reduced to writing and authenticated in the manner prescribed in section two hundred.

See McKinney's, *supra* at 152.

§ 809. Property, when to be restored to person from whom it was taken

If it appear that the property taken is not the same as that prescribed in the warrant, or that there is no probable cause for believing the existence of the grounds on which the warrant was issued, the judge, justice or magistrate must cause it to be restored to the person from whom it was taken, unless otherwise subject to being retained in lawful custody. As amended L. 1962, c. 542, § 13, eff. July 1, 1962.

See Pocket Part, *supra* at 54.

§ 811. Maliciously and without probable cause procuring search warrant, a misdemeanor

A person, who, maliciously and without probable cause, procures a search warrant to be issued and executed, is guilty of a misdemeanor.

See McKinney's, *supra* at 154.

§ 812. Peace officer, exceeding his authority

A peace officer, who, in executing a search warrant, willfully exceeds his authority, or exercises it with unnecessary severity, is guilty of a misdemeanor.

Ibid.

§ 813-c. The motion in general [*for return of property and suppression of evidence*]

A person claiming to be aggrieved by an unlawful search and seizure and having reasonable grounds to believe that the property, papers or things, hereinafter referred to as property, claimed to have been unlawfully obtained may be used as evidence against him in a criminal proceeding, may move for the return of such property or for the suppression of its use as evidence. The court shall hear evidence upon any issue of fact necessary to determination of the motion.

If the motion is granted, the property shall be restored unless otherwise subject to lawful detention, and in any event it shall not be admissible in evidence in any criminal proceeding against the moving party.

If the motion is denied, the order denying such may be reviewed on appeal from a judgment of conviction notwithstanding the fact that such judgment of conviction is predicated upon a plea of guilty. Added L. 1962, c. 954, § 1, eff. April 29, 1962.

See Pocket Part, *supra* at 63.

FILE COPY

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 856

CARL A. VERGARI, District Attorney of Westchester County, New York,

Petitioner,

AGAINST

208 CINEMA, INC. and PHILIP STEINBERG,

Respondents,

AND

ERIC GELDART, Police Chief of the Village of Port Chester, New York,

Respondent.

BRIEF ON BEHALF OF THE STATE OF GEORGIA AS AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 856

CARL A. VERGARI, District Attorney of Westchester County, New York,

Petitioner,

AGAINST

208 CINEMA, INC. and PHILIP STEINBERG,

Respondents,

AND

ERIC GELDART, Police Chief of the Village of Port Chester, New York,

Respondent.

BRIEF ON BEHALF OF THE STATE OF GEORGIA AS AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI

This brief in support of the Petition for Writ of Certiorari is filed by the State of Georgia pursuant to Rule 42(4) of the Rules of this Court.

INTEREST OF AMICUS CURIAE

Aside from the interest of every State (including its judges, prosecutors, and concerned citizens) in ascertaining the status of the law of obscenity, the specific

interest of this Amicus Curiae is to point out one facet of the obscenity problem in the hope of averting a collision of the First and Fifth Amendments. Such a collision would allow hardcore pornographic movies to circulate freely underground, immune from law and legal process, and would allow obscene movies to be shown in neighborhood and drive-in theaters across the nation.

SUMMARY OF ARGUMENT

The Court below has held that the Constitution requires an adversary hearing before seizure of a movie film (Appendix to Petition for Certiorari, p. 28). Now, and unless this Court grants certiorari and reverses, whenever courts seek to hold such hearings as to hardcore pornographic movies, the possessors of such films will refuse to produce and permit the showing of those films, asserting their rights not to incriminate themselves.

The shelter of the First Amendment should not be extended over pornographers to the point where they can step freely under the protection of the Fifth Amendment, and thereby escape the law.

ARGUMENT

In *State v. Koohy*, 250 A.2d 711 (R.I. 1969), the defendant was charged with the commercial exhibition of obscene movies to three minors. The evidence showed that the boys were all 15, that the movies were shown to them in the back hallway at defendant's restaurant at times when the restaurant was closed. Defendant's conviction was reversed because there was no evidence that the showing was done commercially. Obviously the showing of those obscene movies to those young boys was

not done for commercial purposes, but the point is this: How can a State ever have a prior adversary hearing as to obscene movies shown privately to young boys in the back hallway of a business which is closed?

Presumably the offense in the *Koohy* case was discovered when the parents of one or more of the boys learned of their experience. The parents probably went to the police and were referred to the prosecuting attorney. Is he to be required to seek a prior adversary hearing before he can charge the defendant with showing an obscene movie to minors? If so, the prosecutor's hands will be tied, because the defendant will refuse to produce the movie, relying on the Fifth Amendment. See *Boyd v. United States,* 116 U. S. 616 (1886).

Today, there are all sorts of motion pictures. There are Hollywood movies and foreign films, shown in theaters. There are movies produced by the avant-garde. There are amateur movies and home movies. And there are "stag" movies, "underground" movies, and foreign films, even shown commercially but not in theaters. They are shown in fraternity houses, in private clubrooms, and in basements.

It does not appear to us to be a fair basis of distinction to say that Hollywood's commercial movies are entitled to constitutional protection not afforded low-budget and amateur movies. Movies are movies, whether produced by Hollywood or by hippies.

Suppose the daughter of the prosecuting attorney were to see a stag film at a fraternity house. Her father would be helpless if there had to be a prior adversary hearing as to obscenity before he could stop the showing of the film. He might request that the local distributor of stag

films make it available for the hearing, but the distributor could refuse to produce it, relying on the Fifth Amendment. If there had to be a prior hearing, such films could circulate freely underground, protected on the one side by the Fifth and on the other by the prior hearing rule.

If a single movie film cannot be seized, in conjunction with a lawful arrest, without a prior adversary hearing, underground pornographers will be free to circulate their filth. Such circulation would provide lechers with the stimulants with which to debauch minors.

Similarly, commercial movie exhibitors undoubtedly will decline to produce obscene films at the adversary hearing, relying upon the Fifth Amendment.

The Court below erred in holding that obscene movies are entitled to an adversary hearing prior to seizure, and that a print can be made available to the prosecution (Appendix to Petition for Certiorari, pp. 28, 29). The Court below has created a Fifth Amendment loophole for obscenity which will, unless reversed, render null and void this Court's decision in *Roth v. United States*, 354 U.S. 476 (1957).

The Court below erred in holding that the decision in *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964), is applicable to motion pictures. In *Ginzburg v. United States*, 383 U.S. 463 (1966), and *Mishkin v. New York*, 383 U.S. 502 (1966), both affirming criminal obscenity convictions after *A Quantity of Books v. Kansas, supra*, no suggestion was made by the Court that *Books* prohibited a criminal proceeding, and seizure of the obscene materials, where there had been no prior adversary hearing. In *Mishkin*, the majority opinion distinguished *Books*

on the ground that there was no showing as to how many of the total available copies of the *Mishkin* books had been seized (383 U.S. at 513) and on the ground that the Kansas statute created a book burning procedure (383 U.S. at 512, fn. 12). Thus, the Court emphasized that *Books v. Kansas* was based on the mass seizure and book burning aspects of that case.

In *Lee Art Theater, Inc. v. Virginia,* 392 U.S. 636 (1968), the Court had the opportunity to apply *Books v. Kansas* to the seizure of a film, but instead it cited *Marcus v. Search Warrant,* 367 U.S. 717 (1961), thereby withholding the application of the "prior adversary hearing" rule from motion picture films.

The Court below erred, we respectfully submit, in extending *Books v. Kansas* to include the single seizure of a motion picture film in conjunction with the initiation of a criminal prosecution. It erred in creating a conflict between the First and Fifth Amendments, which conflict can be resolved only by this Court.

CONCLUSION

To prevent hardcore pornographic movies from circulating freely under the protection of the Fifth Amendment, the prior adversary hearing rule should not be extended to movies. It is submitted that the petition for certiorari should be granted, and the decision of the Second Circuit Court of Appeals should be reversed.

Respectfully submitted,

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PROOF OF SERVICE

I, Harold N. Hill, Jr., Executive Assistant Attorney General of the State of Georgia, hereby certify that I am of counsel for the Amicus Curiae, that I am a member of the Bar of the Supreme Court of the United States, and that on January ___, 1970, I served the within and foregoing Brief on Behalf of the State of Georgia as Amicus Curiae in Support of Petition for Certiorari upon the parties to said cause by mailing true typed copies thereof to their attorneys of record, Kunstler & Kunstler, 511 Fifth Avenue, New York, New York, and Carl A. Vergari, District Attorney, County of Westchester, Court House, White Plains, New York, 10601, their last known addresses, postage prepaid.

This ..... day of January, 1970.

HAROLD N. HILL, JR.
Executive Assistant
Attorney General
Of Counsel

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Supreme Court of the United States

OCTOBER TERM, 1969

No. 856

CARL A. VERGARI, District Attorney of Westchester County, New York,

Petitioner,

—against—

208 CINEMA, INC. and PHILIP STEINBERG,

Respondents,

—and—

ERIC GELDART, Police Chief of the Village of Port Chester, New York,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS 208 CINEMA, INC. AND PHILIP STEINBERG IN OPPOSITION

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS 208 CINEMA, INC. AND PHILIP STEINBERG IN OPPOSITION

Opinions Below

The District Court opinion, by McLean, J., for the United States District Court for the Southern District of New York, is annexed to the petition for certiorari filed in this Court, Appendix, p. 16, and the order of the United States Court of Appeals for the Second Circuit, Appendix, p. 24.

Jurisdiction

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Whether the seizure of motion picture films by law enforcement officers without a prior adversary proceeding to determine whether or not such films are obscene, violates the First Amendment of the United States Constitution.

Statutes Involved

United States Constitution

First and Fourteenth Amendments

New York Penal Law, §§235.00, 235.05, 235.10 and 235.15

Statement of the Case

While petitioner has set forth the essential facts, it is important that certain corrections and additions be noted.

At no time were any of the films ever adjudicated to be obscene in any competent forum. Several of the films seized had, in fact, been exhibited across the country and in neighboring communities in the metropolitan New York area without incident. Thus petitioner's outright statement that the films seized were obscene is without any foundation.

Further, while two judges may have viewed some of the films before issuing search warrants, the execution of the warrant resulted in the seizing of additional films and

coming attractions that had never been viewed by the judges. In addition, at the time of the first seizure it is clear that the intent of the law enforcement officers was to prevent respondent from exhibiting any further films. The officers blatantly attempted to unbolt the camera and take it, but were unable to do so and, instead, seized the lenses of the camera.

Reasons for Not Granting the Writ

In view of the uniform interpretation of the Circuit Courts of Appeals that seizure of motion picture films without a prior adversary hearing is in violation of the First Amendment, there is no substantial issue or conflict in the Circuits to be resolved by this Court. Specifically, the Seventh Circuit, in *Metzger* v. *Pearcy,* 393 F.2d 202 (7 Cir., 1968), the Second Circuit, in *Bethview Amusement Corp.* v. *Cahn,* 416 F.2d 410 (2 Cir., 1969) and the Fourth Circuit in *Tyrone, Inc.* v. *Wilkinson,* 410 F.2d 639 (4 Cir., 1969), cert. den. —— U.S. ——, are all in accord that where a motion picture is seized from a commercial movie house there must be a prior adversarial hearing. In each instance the fact situations are similar to the case at bar. Therefore, the result in this case clearly follows the law as uniformly interpreted by the Courts of Appeals.

While the District Attorney seeks to provide his own interpretation as to the opinions of this Court, it is clear that each of the Circuits above mentioned has considered this argument and unanimously rejected it. The distinction advanced by petitioner between the seizure of a motion picture film as compared with a quantity of books is insignificant and of no merit.

Further, it is to be noted that this Court has already declined to take certiorari in *Tyrone* v. *Wilkinson*. It is therefore submitted that if certiorari were denied in that case, it should, likewise, be denied in this one since there is no meaningful distinction between the facts in *Tyrone* v. *Wilkinson* and the facts in the case at bar.

CONCLUSION

WHEREFORE, it is respectfully requested that the instant petition for certiorari to the United States Court of Appeals for the Second Circuit be denied.

Respectfully submitted,

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WILLIAM M. KUNSTLER
STEVEN J. HYMAN

Attorneys for Respondents 208 Cinema, Inc. and Philip Steinberg

Dated: February 7, 1970

CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for the respondents 208 Cinema, Inc. and Philip Steinberg, in the within action, hereby certifies that three copies of the within brief for respondents were this day mailed to Carl A. Vergari, District Attorney of Westchester County, New York.

.....

MICHAEL J. KUNSTLER

February 7, 1970